

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NATASHA KAPOR,

Claimant,

No. C 04-05483 MHP

v.

THE COMMISSIONER OF THE SOCIAL  
SECURITY ADMINISTRATION,

**MEMORANDUM & ORDER**  
**Re: Cross Motions for Summary  
Judgment**

Defendant.

On December 28, 2004 claimant Natasha Kapor brought this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of the final decision of the Commissioner of Social Security denying her claim for "Childhood Disability Benefits." Now before the court are the parties' cross-motions for summary judgment. Having considered the arguments presented and for the reasons stated below, the court enters the following memorandum and order.

**BACKGROUND**

Claimant is a twenty-nine-year-old woman with an eleventh grade education and no vocationally relevant past work experience. Tr. 247–48. At the present time claimant lives with her family and relies on public transit or family members for transportation. Id. at 248.

**I. Psychiatric History Before the Age of Twenty-Two**

In her Disability Report, claimant alleges that she became disabled on January 1, 1983 due to psychological problems. Id. at 60. At the age of twelve or thirteen, the problems became more apparent as claimant began to experience panic attacks where she would become shaky and nervous.

1 Id. at 251. Although claimant's performance in school is described as average, her high school  
2 teachers recommended that she enroll in the honors curriculum. Tr. 251–52. The panic attacks and  
3 nervousness, however, caused claimant to miss class to such an extent that a truancy officer was  
4 eventually sent to the family residence. Id. at 252. By the time claimant was seventeen she had  
5 stopped attending school altogether. Id. According to claimant, the social setting of the school  
6 impaired her concentration and she felt uncomfortable being around people. Id. at 253.

7 Claimant first began to receive counseling at age six, and this continued intermittently until  
8 age seventeen. Id. at 156–96. The progress reports for the period indicate that claimant's mother  
9 reported that claimant would get confused, was not doing well in school, would not listen to her, and  
10 had problems concentrating. The reports also indicate that claimant fought regularly with her brother  
11 and father. Id. at 156. In addition, plaintiff was negatively affected by recurring difficulties in her  
12 parents marriage. Id. at 159, 168, 178, 196. Despite these difficulties, the counselor regularly noted  
13 that claimant was an intelligent and talented child. Id. at 156, 158, 159.

14 On October 26, 1993, at the age of seventeen, claimant was evaluated by Dr. Bobrow, a  
15 therapist from Kaiser Permanente, and a psychiatric evaluation form was completed. Id. at 153–55.  
16 The mental status examination noted that claimant was attractive, articulate, slightly dysthymic and  
17 anxious. Id. at 155. Claimant identified school as the major cause of her worries, anxieties and sense  
18 of pressure. The initial diagnostic impression of the therapist was dysthymia. Although, the  
19 treatment plan called for further evaluation of claimant, claimant allegedly stopped the followup  
20 treatment when Dr. Bobrow refused to write a note for her recommending home study. Id. at 149.  
21 Claimant asserts that she stopped attending because she was uncomfortable with Dr. Bobrow as a  
22 therapist and found his attitude towards her inconsiderate and inappropriate. Id. at 236.

## 23 II. Psychiatric History After the Age of Twenty-Two

24 Following this examination by Dr. Bobrow, there are no medical treatment records from  
25 September 1994 to July 2002. On July 17, 2002, a psychiatric diagnostic intake evaluation was  
26 completed at Kaiser Hospital. Id. at 133. Claimant, who was twenty six at the time, reported  
27 increased anxiety and isolation along with panic symptoms. Id. at 134. The diagnosis was social  
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1 phobia and claimant was referred to Dr. Elke Zuercher-White for an anxiety evaluation. Id.

2       The anxiety evaluation was conducted on July 24, 2002. Tr. 129. During this evaluation,  
3 claimant complained of a nervous stomach, dizziness, and a rapid heart beat whenever she was in  
4 social situations or in anticipation of them. Id. The social situations she described included: meeting  
5 new people, crowds, parties, crowded public restrooms, eating or drinking with unfamiliar people,  
6 and public places in general. Id. at 130. Claimant also reported washing her hands every 15–20  
7 minutes and showering for half an hour every day. Id. at 131. Dr. Zuercher-White diagnosed  
8 claimant with social phobia and a mild form of obsessive-compulsive disorder. Id. at 132. The  
9 doctor noted that the extent of her social phobia did not appear to fully explain her extremely poor  
10 ability to function and that it appeared that a lack of parental expectations was the likely cause. Id.

11       On January 10, 2003, at the age of twenty seven, a psychological consultive evaluation was  
12 conducted by Dr. Jonathan Gonick-Hallows, Ph.D. Id. at 197. According to claimant, she had not  
13 seen a therapist since age seventeen because of bad experiences in her psychotherapy relationships  
14 and a resistance to group therapy. Id. Dr. Gonick-Hallows diagnosed claimant with mixed anxiety  
15 disorder with social phobia, panic attacks, obsessive-compulsive symptoms, and severe performance  
16 anxiety. Id. at 199. The doctor concluded that claimant was thoughtful and articulate, but somewhat  
17 fearful and avoidant. Id. at 200. Indeed, the prognosis provided by Dr. Gonick-Hallows was guarded,  
18 noting that there was a possibility for improvement if claimant was able to find a comfortable long-  
19 term psychotherapeutic situation with an unusually experienced psychotherapist. In the absence of  
20 such treatment, the doctor predicted that claimant would continue to be compromised in her level of  
21 adjustment. Id.

22       On January 13, 2004, another psychological evaluation was conducted by Dr. Joanne C.  
23 Keaney. Id. at 242. The evaluation was scheduled in order to clarify the presence and severity of the  
24 client's mental illness prior to age twenty-two. Id. at 239. Dr. Keaney administered a number of tests,  
25 including a self-report personality test that assesses emotional and psychological difficulties. Based  
26 on the test data, the doctor concluded that the claimant was currently experiencing a severe mental  
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1 disorder. The diagnosis was avoidant personality disorder with negativistic and self defeating traits.  
2 Id. The MCMI profile also suggested anxiety spectrum disorders and dysthymia. Id.

3 III. Procedural History

4 Claimant first filed for Childhood Disability Benefits on April 5, 1997 when she was twenty  
5 one years old, but the application was denied in the first instance and then again on reconsideration.  
6 Tr. 15. On June 5, 2002, claimant filed again for Childhood Disability Benefits. The claim was again  
7 denied initially and on reconsideration, and a request for a hearing was filed. Claimant appeared and  
8 testified before an Administrative Law Judge ("ALJ") on November 3, 2003. Id. On November 20,  
9 2003, the ALJ found that claimant was *not* under a disability as defined by the Social Security Act  
10 because claimant's impairment did not significantly limit her ability to perform basic work-related  
11 activities. Id. at 19. Specifically, the ALJ concluded that the medical evidence established that  
12 claimant *did not* have an impairment before age twenty-two and that any limitations that existed were  
13 minimal and not related to a medically determinable physical or mental impairment. Id.

14 On January, 2004, claimant filed a request for review of the hearing decision because of the  
15 absence of a function-by-function assessment by the ALJ of claimant's ability to do work-related or  
16 school related physical and mental activities. Id. at 10. Claimant also argued that a medical expert  
17 should have been present at the hearing pursuant to Social Security Ruling 83-20. Id. In considering  
18 whether to grant the appeal, the Appeals Council reviewed Dr. Keaney's January 13, 2004  
19 psychological report on the presence of mental illness prior to age twenty-two. Id. at 9. On October  
20 28, 2004, the Appeals Council denied claimant's request for review, finding that there was no reason  
21 to review the ALJ's decision. Id. at 5. Consequently, the ALJ's November 20, 2003 decision is the  
22 final decision of the Commissioner of Social Security in this action. Id.

23  
24 LEGAL STANDARD

25 A district court may disturb the Commissioner's final decision on whether a person is disabled  
26 "only if [the decision] is based on legal error or if the fact findings are not supported by substantial  
27 evidence." Sprague v. Bowen, 812 F.2d 1226, 1229 (9th Cir. 1987). Substantial evidence means  
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1 "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."  
2 Howard v. Heckler, 782 F.2d 1484, 1487 (9th Cir. 1986) (quoting Richardson v. Perales, 402 U.S.  
3 389, 401 (1971)). Substantial evidence is "more than a mere scintilla but less than a preponderance."  
4 Matney v. Sullivan, 981 F.2d 1016, 1018 (9th Cir. 1992). In evaluating the evidence, the court "must  
5 consider the record as a whole," including evidence that supports the Commissioner's decision and  
6 evidence that detracts from it." Desrosiers v. Secretary of Health & Human Servs., 846 F.2d 573, 576  
7 (9th Cir. 1988). Nonetheless, the ALJ is charged with resolving ambiguities in the evidence, and  
8 where evidence exists to support more than one rational interpretation, the court must defer to the  
9 ALJ's decision. Andrews v. Shalala, 53 F.3d 1035, 1039–40 (9th Cir. 1995). The ALJ's  
10 determinations of law, however, are reviewed *de novo*. McNatt v. Apfel, 201 F.3d 1084, 1087 (9th  
11 Cir. 2000). Even if substantial evidence supports the ALJ's fact findings, his decision must be set  
12 aside if improper legal standards were applied in reaching that decision. Benitez v. Califano, 573  
13 F.2d 653, 655 (9th Cir. 1978).

## 14 15 DISCUSSION

16 Claimant seeks judicial review of the Commissioner's decision and moves for summary  
17 judgment on the following three issues: (1) whether the ALJ's findings on "severe" impairments were  
18 supported by substantial evidence; (2) whether the ALJ properly discounted claimant's credibility; and  
19 (3) whether the ALJ improperly ignored Social Security Ruling 83-20's requirement that the testimony  
20 of a medical advisor be obtained. Upon review of the record, this court finds that the ALJ's decision  
21 must be set aside due to the application of improper legal standards.

### 22 I. ALJ's Findings on Severe Impairment

23 Claimant asserts that the ALJ's findings on "severe" impairment were contrary to all the  
24 evidence and were not supported by substantial evidence. In order to establish a claimant's eligibility  
25 for disability benefits under the Social Security Act, it must be shown that: (a) the claimant suffers  
26 from a "medically determinable physical or mental impairment that can be expected to result in death  
27 or that has lasted or can be expected to last for a continuous period of not less than twelve months";  
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1 and (b) the impairment renders the claimant incapable of performing the work that the claimant  
2 previously performed and incapable of performing any other "substantial gainful work which exists in  
3 the national economy." 42 U.S.C. § 423 (d)(2)(A). If the claimant meets both of these criteria, then  
4 he or she is "disabled." Id.

5 Federal regulations promulgated by the Commissioner set forth a five step sequential analysis  
6 to be used by an ALJ in determining whether a claimant is disabled. See 20 C.F.R. 404.1520(a)(4).  
7 At each step a finding of disability or non-disability can be made, thus ending the inquiry. First, the  
8 ALJ must consider the claimant's "work activity, if any." Id. If the claimant is engaged in  
9 "substantial gainful activity," then the claimant is not disabled and the claim is denied. 20 C.F.R.  
10 404.1520(a)(4)(i). If the claimant is not engaged in substantial gainful activity, then Step Two  
11 requires the ALJ to determine whether the claimant has a medically severe impairment or  
12 combination of impairments.<sup>1</sup> 20 C.F.R. 404.1520(a)(4)(ii). Where a claimant seeks child's benefits,  
13 the claimant must show that he/she is "disabled continuously and without interruption beginning  
14 before her twenty-second birthday until the time she applied for child's disability insurance benefits."  
15 Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996). Thus, an important finding in determining  
16 whether a claimant is eligible for child disability benefits is the onset date of the disability.

17 In this case, the ALJ terminated the inquiry at Step Two with the conclusion that claimant was  
18 not currently disabled and did not suffer from a medically determinable impairment prior to age  
19 twenty-two.<sup>2</sup> However, this conclusion ignores the fact that claimant has been receiving  
20 Supplemental Security Income ("SSI") for her disability since February 2003. Tr. 18. The definition  
21 of disability for SSI is identical to the definition of disability for Childhood Disability Benefits. See  
22 20 C.F.R. 416.905(a). The ALJ acknowledged, although he did not find dispositive, the fact that  
23 claimant was receiving SSI payments due to her disability since February of 2003. Tr. 18. Further,  
24 the consultation request, completed in association with the SSI benefits, stated that claimant is  
25 "currently incapable of going to a place of employment via public transportation and of relating to  
26 others and of completing daywork/weekwork activities without interruptions due to psychological  
27 factors." Id. at 220. Recent psychological examinations confirm that claimant "is experiencing a  
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1 severe mental disorder" and has a "significantly compromised" level of adjustment. Id. at 242, 200.  
2 The record clearly indicates that claimant currently suffers from a disability. The critical  
3 determination, therefore, is whether the underlying impairment qualified as a disability prior to  
4 claimant reaching age twenty-two. This inquiry necessarily requires that an onset date for claimant's  
5 disability be determined. As will be discussed below, the determination of onset date must be made  
6 in consultation with a medical advisor. See Armstrong v. Commissioner of the Social Security  
7 Administration, 160 F.3d 587, 589 (9th Cir. 1998).

8 Although not dispositive in the present case, the court is additionally concerned with what  
9 appears to be a procedural deficiency in the ALJ's decision. In the evaluation section it is clear that  
10 the ALJ does not find an impairment, severe or otherwise, in existence prior to age twenty-two.  
11 However, the findings section indicates there is a current impairment, but that it is not severe enough  
12 to rise to the level of a disability. To the extent that the ALJ is making a severity determination, the  
13 procedures codified in 20 C.F.R. 404.1520a must be followed.<sup>3</sup> This regulation requires that "when  
14 we evaluate the severity of mental impairments for adults (persons age 18 and over) and in persons  
15 under age 18 . . . we must follow a special technique at each level of the administrative review  
16 process." 20 C.F.R. 404.1520a. The "special technique" requires specific ratings of the degree of  
17 limitation in four broad functional areas, analysis of the criteria of the appropriate listed mental  
18 disorder and standardized documentation of the utilized technique. These requirements were not  
19 observed in either the ALJ's or the Appeals Council's decision.

20 Compliance with Social Security Ruling 83-20

21 The ALJ committed reversible error by failing to call a medical expert to determine the onset  
22 date of claimant's mental impairment. The Ninth Circuit has held that if the "medical evidence is not  
23 definite concerning the onset date and medical inferences need to be made, [Social Security Ruling  
24 83-20] requires the administrative law judge to call upon the services of a medical advisor and to  
25 obtain all evidence which is available to make the determination." Delorme v. Sullivan, 924 F.2d  
26 841, 848 (9th Cir. 1991). Social Security Ruling 83-20 states, in pertinent part, that "[i]n some cases,  
27 it may be possible, based on the medical evidence to reasonably infer that the onset of a disabling  
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1 impairment occurred some time prior to the date of the first recorded medical examination." 1983  
2 WL 31249 (S.S.A.).<sup>4</sup> The duration and severity of the impairment "depends on an informed judgment  
3 of the facts in the particular case," but "the administrative law judge should call on the services of a  
4 medical advisor when onset must be inferred." Id. For example, in Armstrong, the claimant filed  
5 applications for both Disability Insurance Benefits ("DIB") and SSI. After a hearing, the ALJ granted  
6 claimant's SSI application, but denied the DIB application, finding that the claimant was not disabled  
7 prior to the required date. Upon review, the Ninth Circuit held that the onset date was unclear and  
8 that "the ALJ therefore committed reversible error by failing to call a medical expert before inferring  
9 an onset date." Armstrong, 160 F.3d at 589.

10 In the present action, the ALJ concluded that "claimant did not have an impairment . . . before  
11 age twenty two, that caused more than minimal functional limitations." Tr. 19. However, the ALJ  
12 explicitly found that claimant suffers from a medically determinable impairment diagnosed as  
13 dysthymia. Id. at 19. A review of the record and evidence in this case reveals an ambiguity regarding  
14 the onset of claimant's mental impairment. Therefore, an inference would necessarily be required to  
15 determine the onset date of the disability. As Social Security Ruling 83-20 mandates, any inference  
16 with respect to the onset of a disability must have a legitimate medical basis formed in consultation  
17 with a medical advisor.

18 In the decision below, the ALJ relied primarily on the lack of therapy for claimant between the  
19 ages of seventeen and twenty-two as evidence of an absence of medical disability. Id. at 18. The  
20 Ninth Circuit, however, has "particularly criticized the use of a lack of treatment to reject mental  
21 complaints both because mental illness is notoriously underreported and because 'it is questionable  
22 practice to chastise one with a mental impairment for the exercise of poor judgment in seeking  
23 rehabilitation.'" Regennitter v. Commissioner of SSA, 166 F.3d 1294, 1299-1300 (9th Cir. 1999)  
24 (quoting Blankenship v. Bowen, 874 F.2d 1116, 1124 (6th Cir. 1989)). Furthermore, since "mental  
25 disorders may manifest themselves over a period of time . . . the precise date of onset of a disabling  
26 psychological impairment may be difficult or impossible to ascertain, and the services of a specialist  
27 may be necessary to infer the onset date." Morgan v. Sullivan, 945 F.2d 1079, 1081 (9th Cir. 1991).



1 The lack of medical evidence, therefore, militates against inferring an onset date and in favor of  
2 consulting a medical advisor.

3 Defendant contends that because the ALJ found insufficient evidence of a severe impairment  
4 prior to age twenty-two, there is no onset date to determine in the case. While this argument has some  
5 logical pull, it is in complete contravention of the fundamental purpose of Social Security Ruling 83-  
6 20. As the Ninth Circuit has noted, "[i]f . . . an ALJ does not have to call a medical expert unless the  
7 claimant has fulfilled his burden of proving an onset date, SSR 83-20 would have no application."  
8 Armstrong, 160 F.3d at 590. Arguments such as those of defendant's render a medical expert useless  
9 because "[i]f the claimant proved a date, there would be no need to call a medical expert, and if the  
10 claimant . . . was unable to prove a date, then the ALJ would deny disability benefits because the  
11 claimant failed to carry his burden." Id. Thus, to ensure that claimant's eligibility for disability  
12 benefits receives a fair review, "where a record is ambiguous as to the onset of disability, the ALJ  
13 must call a medical expert to assist in determining the onset date." Id.

14 Defendant further argues that it is claimant's burden to prove she was disabled before reaching  
15 age twenty-two and that she has failed to meet this burden. Although claimant certainly bears the  
16 ultimate burden to prove disability, "the ALJ must assist in developing the record." Quarles v.  
17 Barnhart, 178 F.Supp.2d 1089, 1096 (N.D. Cal. 2001). In this case, the medical evidence is not clear  
18 with respect to the onset date of claimant's disability. "Rather than just inferring an onset date, which  
19 would deny a claimant benefits, [Social Security Ruling 83-20] requires that the ALJ create a record  
20 which forms a basis for that onset date." Armstrong, 160 F.3d at 590. Once "the ALJ has created a  
21 record and has a basis for selecting an onset date, the claimant who wishes to challenge that date bears  
22 the burden of proof." Id. In the action before this court, the ALJ failed to call a medical advisor and,  
23 therefore, was unable to determine an onset date for claimant's disability. By simply concluding that  
24 there was insufficient evidence to prove a disability existed prior to claimant reaching age twenty-  
25 two, the ALJ in effect inferred that the onset date occurred after the age of twenty-two. This  
26 conclusion is not in accordance with Social Security Ruling 83-20 and applicable law. The ALJ,  
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1 therefore, erred when he did not call a medical advisor to determine the onset date of claimant's  
2 impairment and his judgment is reversed accordingly

3 III. ALJ's Determination of Claimant's Credibility.


4 Claimant further argues that the ALJ erred by not making any findings as to whether  
5 claimant's subjective complaints were credible. If there is an objective medical basis for the existence  
6 of a symptom and no evidence of malingering, an ALJ must provide clear and convincing reasons for  
7 rejecting a claimant's subjective testimony. Swenson v. Sullivan, 876 F.2d 683, 687 (9th Cir. 1989).  
8 However, given the ALJ's reversible error with respect to the use of a medical expert to determine  
9 onset date, the court need not reach this issue.

10  
11 Conclusion

12 \_\_\_\_\_ For the reasons stated above, the court GRANTS claimant's motion for summary judgment  
13 and DENIES defendant's motion for summary judgment. This action is hereby REMANDED  
14 pursuant to sentence four of 42 U.S.C. section 405(g) to the Commissioner for further proceedings  
15 consistent with the foregoing order. The clerk shall close the file.\_\_\_\_

16 \_\_\_\_\_ IT IS SO ORDERED.

17  
18 Date: November 16, 2005

  
\_\_\_\_\_  
MARILYN HALL PATEL  
District Judge  
United States District Court  
Northern District of California

**ENDNOTES**

1. Although not reached in the present action, Step Three requires the ALJ to consider the medical severity of the impairment. 20 C.F.R. 404.1520(a)(4)(iii). If the impairment meets or equals one of the impairments in the regulatory list of impairments and meets the duration requirement, then the claimant is disabled. Id. If the impairment does not correspond to an impairment from the list, then the ALJ must proceed to Step Four, which requires an assessment of the claimant's "residual functional capacity" and relevant work experience. 20 C.F.R. 404.1520(a)(4)(iv). If the claimant has sufficient residual functional capacity to perform his or her past work, then the burden shifts to the Commissioner at Step Five to demonstrate that the claimant can perform some work available in significant numbers in the national economy. 20 C.F.R. 404.1520(a)(4)(v). The Commissioner may take into consideration the claimant's "residual functional capacity . . . age, education, and work experience." Id.

2. Despite the application of improper legal standards, a thorough review of claimant's psychological history and mental status evaluations could lead a reasonable person to conclude that claimant did not suffer from a severe impairment prior to age twenty-two. See Howard, 782 F.2d at 1487. Therefore, the ALJ's findings on severe impairment prior to age twenty-two appear to be supported by evidence in the record. However, the record clearly suggests a current disability. The critical oversight is the fact that claimant was already receiving SSI benefits at the time of the decision.

3. The apparent discrepancy in the ALJ's decision may be explained by the different time periods being discussed. In other words, the ALJ determined that although claimant did not have an impairment prior to age twenty-two, she does suffer from an impairment at the present time. While such an interpretation alleviates the requirements of 20 C.F.R. 404.1520a, it also reinforces the necessity to call a medical expert to determine the onset date of the impairment.

4. Social Security Rulings are "binding on all components of the administration." Sullivan v. Zebley, 493 U.S. 521, 531 (1990).